JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)

4 March 1999 *

In Case T-87/96,

Assicurazioni Generali SpA and Unicredito SpA, companies incorporated under Italian law, established in Trieste and Treviso, Italy, respectively, represented by Aurelio Pappalardo, of the Trapani Bar, and Claudio Tesauro, of the Naples Bar, with an address for service in Luxembourg at the Chambers of Alain Lorang, 51 Rue Albert I,

applicants,

v

Commission of the European Communities, represented by Richard Lyal and Fabiola Mascardi, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gomez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

* Language of the case: Italian.

Italian Republic, represented by Professor Umberto Leanza, Head of the Legal Service, Ministry of Foreign Affairs, acting as Agent, assisted by Ivo M. Braguglia, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

intervener,

APPLICATION for annulment of the Commission Decision in Case No IV/M.711 — Generali/Unicredito of 25 March 1996 concerning a procedure for the application of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (corrected version, OJ 1990 L 257, p. 14),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(First Chamber, Extended Composition),

composed of: B. Vesterdorf, President, C.W. Bellamy, R.M. Moura Ramos, J. Pirrung and P. Mengozzi, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 14 July 1998,

gives the following

Judgment

Facts and procedure

1 By a decision dated 25 March 1996 the Commission found, under Article 6(1)(a) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (corrected version, OJ 1990 L 257, p. 14, hereinafter 'Regulation No 4064/89'), that the creation of a joint venture known as Casse e Generali Vita SpA (hereinafter 'CG Vita' or 'joint venture'), pursuant to agreements notified to it on 9 February 1996 by Assicurazioni Generali SpA (hereinafter 'Generali') and Unicredito SpA (hereinafter 'Unicredito'), did not constitute a concentration within the meaning of Article 3 of Regulation No 4064/89 — as it was worded at the time when that decision was adopted, before being amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1989 L 180, p. 1 — and thus did not come within the scope of that regulation (Case No IV/M.711 — Generali/Unicredito, hereinafter the 'contested decision'). The abovementioned agreements were in the form of a letter of intent dated 10 January 1996, complemented by a letter of 9 February 1996 and ancillary corporate agreements signed on the same date.

2 Accordingly, the Commission, at the request of the notifying parties, treated the notification referred to above as an application (for negative clearance) under Article 2 or as notification under Article 4 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62 (I), p. 87, hereinafter 'Regulation No 17'), in accordance with Article 5 of Commission Regulation (EC) No 3384/94 of 21 December 1994 on the notifications, time-limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, which was in force at the material time (OJ 1994 L 377, p. 1,

hereinafter 'Regulation No 3384/94'). By letter dated 1 April 1996 it informed the parties that the case had been closed on the ground that Article 85 of the Treaty was not applicable since the agreements notified were not capable of appreciably affecting trade between Member States.

3 At the time when the abovementioned agreements, providing for CG Vita to be controlled jointly by Unicredito and Generali, were notified to the Commission, that company was known as Quercia Vita SpA and was solely controlled by Unicredito. According to the terms of the abovementioned letter of intent and the form used to notify the relevant operation under Regulation No 4064/89 ('form CO'), it was not carrying on business and did not yet have authorisation from the Istituto per la Vigilanza sulle Imprese di Assicurazione Private e di Interesse Collettivo (supervisory authority for undertakings offering private and group insurance, 'ISVAP'), as required by Italian Decree-Law No 174 of 17 March 1995, under which such authorisation must be obtained to carry on insurance business, in order to ensure consumer protection.

4 CG Vita is intended to carry on insurance business in the fields of 'life assurance', 'capitalisation' and 'retirement funds' within the limits, in the case of the latter area, of the business reserved under Italian legislation exclusively to insurance companies (point 1.1.1 of the letter of intent). More specifically, under Article 4 of its articles of association, its object is to carry on insurance and reinsurance business in the areas mentioned at Points A and B of the table appended to Legislative Decree No 174 of 17 March 1995 both in Italy and abroad, and to take holdings in companies having the same object. CG Vita's first five-year business plan drawn up under the abovementioned Italian legislation with a view to its examination by ISVAP provides that the joint venture is to operate essentially, at least initially, in the sector of individual insurance with very simple products (hereinafter referred to as the company's 'business plan').

5 Under Articles 6 and 7 of its articles of association, CG Vita has a share capital of ITL 2 billion which may be increased to ITL 20 billion or, according to the abovementioned form and letter of intent, to a higher level depending on the industrial plan. According to the observations of the Italian Government,

mentioned in the contested decision, Generali's initial financial commitment was limited at the time to ITL 300 million. The staff of the joint venture, initially comprising 15 persons — including a managing director, commercial (executive) manager, and an officer with technical and administrative responsibility — is to be regularly increased until it reaches 23 during the fifth financial year, according to the list of posts contained in the business plan. Under Article 5 of the articles of association the joint venture is established for a period expiring on 31 December 2050 but capable of being extended.

6 According to the letter of intent and the form CO, Generali is an insurance company carrying on insurance and reinsurance business in all areas of 'loss' and 'life assurance' business. It controls the Generali group which, according to the contested decision, is the leading group of insurance companies in Italy.

7 Unicredito is a financial company whose object includes, in particular, the acquisition and management of holdings in companies in the banking, finance and insurance sectors. It is at the head of the Unicredito banking group which comprises the companies Cassa di Risparmio di Verona Vicenza Belluno e Ancona ('Cariverona') and Cassa di Risparmio della Marca Trivigiana ('Cassamarca'), together with the companies under their control.

8 In the abovementioned letter of intent of 10 January 1996, Generali and Unicredito begin by mentioning their intention to enter into participation and cooperation agreements in the banking, finance, insurance and ancillary sectors, in order to bring about the reciprocal integration of their business activities. They point out essentially that their initiative is in line with the most recent developments in the banking and insurance sectors which tend to favour integration as between sectors with a view to broadening the supply of banking, financial insurance and ancillary products in general by means of an improved and more extensive utilisation of the respective distribution networks of operators, and to lay emphasis on savings, efficiency and synergies.

9 Within that framework and with a view to 'subsequently consolidating their cooperative relationship', Generali and Unicredito state that they are intending to develop 'participation and collaboration', first, by setting up the CG Vita joint venture and, secondly, by providing for 'operational activities' (point 1 of the letter of intent).

10 Only the creation of the CG Vita venture was notified, as required. That venture was carried out, in accordance with the letter of intent (point 1.1.1), by Generali taking a 50% stake in the capital of CG Vita, which was until then wholly owned by Unicredito. The abovementioned ancillary agreements state that the board of directors is to be made up of an equal number of members appointed as to one half by Cariverona and Cassamarca and as to the other half by Generali. Under Article 14 of the articles of association of CG Vita, the extraordinary general meeting is to pass resolutions on commercial matters by an absolute majority of the share capital.

11 The letter of intent states that the portfolio of Eurovita insurance policies placed by Cariverona and Cassamarca and held by Eurovita is to be transferred by Eurovita to CG Vita pursuant to an agreement between those three companies (point 1.1.2).

12 Moreover, the letter of intent (point 1.1.1) provides that CG Vita is to market its own products via the network of agencies and banks controlled by Unicredito. Agreements may also be concluded with other networks, whether or not in the banking sector. According to the details indicated in the business plan and confirmed by the parent companies in their replies of 29 February and 12 March 1996 to requests for information from the Commission, the Unicredito banking network is to deal with the distribution of CG Vita products under agency agreements rather than distribution agreements.

13 The letter of intent also states that the banks in the Unicredito group are to entrust CG Vita with all life assurance business, including that concerning their employees (point 1.1.1). Furthermore, the funds of the joint venture are to be

deposited with banks in the Unicredito group, which are also to manage securities invested in line with technical reserves (point 1.1.3).

14 In regard to the abovementioned 'operational activities', Generali undertakes essentially to avail itself increasingly and on a preferential basis of the banking and financial services of the Unicredito group which are to be supplied to it on the most favourable market terms. As to Unicredito, it undertakes to send instructions to the banks controlled by it for them to take out all new insurance policies with Generali against 'damage', on the most favourable market terms. Furthermore, the banks in the Unicredito group and Generali are to study the possibility of adopting joint initiatives in order to identify and place insurance products from the 'damage' sector which are also to be aimed at customers of the banks controlled by Unicredito, without excluding the joint establishment of a new company in this specific sector (point 1.2 of the letter of intent).

15 Unicredito and Generali agree to set up a working group with the task of promoting those joint initiatives and developing others, such as, for example, the installation of automatic methods of payment at Generali agencies, the establishment of cooperation in the credit card sector and electronic banking services in general; the pooling of services offered by the banks in the Unicredito group and by Generali in the business banking sector; and examining the possibility of bringing Unicredito's bank agencies and Generali's offices or agencies closer together (point 3 of the letter of intent).

16 As regards professional training, the letter of intent states that Generali is to collaborate closely in putting in place structures for the training of Unicredito staff engaged in the promotion and sale of insurance products. Under CG Vita's business plan, agreements between that undertaking and its parent companies are to provide for the introduction for that purpose of courses organised by teachers ('esperti docenti') of the Assicurazioni Generali training school (Scuola di Formazione Professionale delle Assicurazioni Generali). The cost of that training,

charged to the undertaking concerned, will range from ITL 500 million during the first year to ITL 243 million during the fifth year, according to the figures set out in the business plan.

17 The letter of intent also contains exclusivity agreements which, according to the reply by Generali and Unicredito to a formal request for information from the Commission, apply solely to the setting up of CG Vita by the acquisition of 50% of its capital by Generali and to the distribution of the products of that venture by the Unicredito banking network. Generali expressly undertakes in the letter of intent not to enter, without Unicredito's agreement, into cooperation and/or participation agreements drafted in similar terms with other banks in the Italian regions in which the banks of that group are present in significant numbers.

18 Unicredito gives Generali an undertaking couched in similar terms. More specifically, it undertakes not to acquire, either directly or indirectly, without Generali's agreement, holdings in other insurance companies by way of permanent and operational investments. Excluded from that undertaking are any potential acquisitions of holdings in companies and/or in banking holding companies which in turn have direct or indirect holdings in insurance companies.

19 More specifically in regard to the distribution of CG Vita products, it is stated in the supplementary letter of 9 February 1996, mentioned above, that the period of exclusivity imposed on Unicredito for that distribution is limited to five years.

20 Finally, the business plan provides that the founding companies are to give their assistance at cost price to the joint venture in a number of areas. Under its terms the amounts to be reimbursed to the parent companies are stated to be ITL 800 million for the first year, with annual 5% increments. CG Vita is to gain the greatest possible benefit from its parent companies' IT facilities. Technical and administrative procedures concerning life assurance policies (issue of policies,

bookkeeping, settlement of claims, calculation of balance sheet reserves, etc.) are to be those used by Generali. Consequently, for at least as long as the portfolio volume is not sufficient to support the cost of an internal auditing department, internal auditing will be carried out by the internal auditing division of Generali (Ufficio di Internal Auditing). Further, for the medical and professional assessment of the risks proposed, CG Vita may 'at least during its first accounting year' call on Generali's medical risk assessment service. Finally, it is also to be provided with technical and actuarial assistance by Generali which will second an actuary. However, the business plan underscores 'the intention to make the management of the company autonomous, over time, which will be brought about progressively, in parallel to the growth in the volume of business'.

21 Following notification of the agreements described above, the procedure took the following course: on 23 February 1996 the Commission addressed to the parties an initial formal request for information under Article 11 of Regulation No 4064/89. It stressed that, in order for CG Vita to be classified as a fully operational joint venture, it was necessary for the Commission (a) 'generally to obtain additional information and explanations as to the independent and fully operational nature of that venture, particularly in regard to resources and an indication of the 'timing' laid down for the actual start-up of its business'; (b) to apprise itself of the joint venture's industrial plan; (c) to have additional information concerning Eurovita and (d) for the portfolio of contracts to be transferred to CG Vita to be specified. The parent companies notified the business plan to the Commission and replied to the request for information by letter of 29 February 1996, stating in particular that the marketing of CG Vita products would be carried out by Unicredito branches acting as agents.

22 On 4 March 1996 the Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority) sent the Commission a communication in which it asked for the case to be referred to it under Article 9 of Regulation No 4064/89. Generali and Unicredito were informed of that communication by the Commission which, on 6 March 1996, addressed to them a second formal request for information essentially to enable them to give further particulars of their market position, to describe Generali's distribution network for life assurance products and to indicate any agreements in force as between Generali and other banking

companies. They replied to that request by letter of 12 March 1996 and, following an informal meeting with officials from the Merger Task Force ('MTF') of the Commission's Directorate General for Competition (DG IV) on 13 March 1996, they provided further details in a letter to the Commission of 15 March 1996, concerning, in particular, the ancillary nature of the exclusive distribution agreement for products covered by the joint venture.

23 On 25 March 1996 the Commission adopted the contested decision in which it found that the operation notified did not constitute a concentration within the meaning of Article 3(2) of Regulation No 4064/89 on the ground that CG Vita did not enjoy 'effective operational autonomy and exhibited many features which lead to the conclusion that overall the operation is cooperative in nature' (points 21 and 22).

24 As regards, first of all, operational autonomy, the Commission states in the contested decision that 'the information and evidence available to it do not enable it to conclude with a sufficient degree of probability that the joint venture enjoyed actual and adequate operational autonomy' (point 13). That assertion is based on two findings. First, 'in spite of the declared intention of the parties to make management of the undertaking progressively more autonomous... almost all of the services connected with the business of producing and managing insurance policies (issue procedures, bookkeeping, settlement of claims, calculation of balance sheet reserves, risk assessment, assistance in technical and actuarial matters and so on) is to be provided under the organisational structures of Generali, at least until such time (obviously impossible to predict) as the growth of the insurance portfolio will be such as to enable the joint venture to absorb the costs connected with the independent carrying on of the business and the services in question' (point 16). Secondly, unlike the Zurigo/Banco di Napoli decision (IV/M.543), in particular, 'the fact that CG Vita's insurance products do not display features enabling them to be distinguished unequivocally as to their nature and content from products already developed and marketed by Generali through the banking system would appear to weaken still further the arguments tending to support the autonomous nature of the joint venture' (point 17).

25 The Commission goes on to appraise 'the financial significance, from the point of view of the whole operation, of the matters on which the founding companies are to cooperate as regards preferential access to the market in life assurance products via the banking sector' (point 18). It points out, first, that the operation contemplated forms part of a more extensive scheme for cooperation between Generali and Unicredito in the banking, finance, insurance and ancillary business sector which was outlined in the letter of intent and in regard to which the operation in question constitutes just one single stage. Moreover, the fact that the parties have an interest in cooperating over a wide range of matters in the finance and insurance sectors seems also to be borne out by the reciprocal exclusivity agreements provided for in the letter of intent which, according to the Commission, cover all the areas in which there is to be cooperation (point 19). Secondly, the Commission finds essentially that the operation is to be viewed against the background of a market for the distribution of life assurance products in Italy which is already characterised, on the one hand, by a widespread distribution of exclusivity agreements binding agency networks as sole agents to the various insurance companies and, on the other, by the rapid growth in intermediary business carried on by the banks for the distribution of life assurance products. In that context, the banking network is set increasingly to become a preferential and in some cases the only available distribution system for accessing the life assurance market, owing to the difficulties and costs associated with setting up sufficiently widespread and varied distribution networks (point 20).

26 By application lodged at the Court Registry on 5 June 1996, Generali and Unicredito sought the annulment of the contested decision.

27 By application lodged at the Court Registry on 28 February 1997, the Italian Republic sought leave to intervene in support of the form of order sought by the Commission. By order of 21 April 1997, the President of the Third Chamber (Extended Composition) granted the application.

28 After a new judge took up his duties at the Court of First Instance, the case was reassigned on 4 March 1998 to the First Chamber (Extended Composition) and a new Judge-Rapporteur was designated.

29 On hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. At the Court's request, the parties produced certain documents before the date of the hearing pursuant to measures of organisation of procedure taken under Article 64 of the Rules of Procedure. The hearing was held on 14 July 1998.

Forms of order sought by the parties

30 The applicants claim that the Court should:

— annul the contested decision;

— order the defendant to pay the costs.

31 The defendant and the intervener contend that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the action as unfounded;

— order the applicants to pay the costs.

Admissibility

Arguments of the parties

32 The Commission raises an objection of inadmissibility against the action on the ground that the contested decision produces no immediate legal effects of such a kind as to affect the interests of the applicants. The contested decision, it contends, is only in the nature of an interim decision since it merely determines the procedure to be followed and the substantive provisions applicable on examination of the operation at issue. It simply notes that the operation in question does not fall within the scope of Regulation No 4064/89 and states that notification will, in accordance with the notifying parties' request, be regarded as an application for negative clearance under Article 2 of Regulation No 17 or as notification under Article 4 thereof. Only the subsequent Commission decision on the compatibility of the operation at issue with Article 85 of the Treaty determines, it is contended, the definitive stance of that institution as regards the question whether that operation may be implemented under the detailed scheme proposed by the notifying parties or under other arrangements.

33 In that respect the defendant institution draws a distinction between two types of decision adopted under Article 6(1)(a) of Regulation No 4064/89. By adopting, as in the present case, a decision finding that the operation notified does not amount to a concentration, the Commission retains jurisdiction. The lawfulness of that interim decision could be examined in the context of an appeal against the Commission's final decision on completion of the procedure for implementing Article 85 of the Treaty without depriving the notifying undertakings of the benefit of the protection of Community law. It is only if the Commission were to consider that Article 85(1) of the Treaty does not apply and there is therefore no need to adopt an exemption decision under Article 85(3) of the Treaty that the national authorities would regain jurisdiction to examine the operation.

34 Conversely, whereas the Commission has sole competence to examine concentrations having a Community dimension, a decision by the Commission under Article 6(1)(a) of Regulation No 4064/89 finding that an operation constitutes a concentration but does not have a Community dimension automatically means that the Commission lacks jurisdiction, thus rendering national rules on competition applicable. Such a decision is capable of forming the subject-matter of an action for annulment under the fourth paragraph of Article 173 of the Treaty, as the Court held in its judgment in Case T-3/93 *Air France* v *Commission* [1994] ECR II-121.

35 The Italian Republic adopts the same line of argument as the Commission. The contested decision, it says, is not the final act in the procedure initiated by the notification referred to in Article 4 of Regulation No 4064/89. That is a two-stage procedure. At the first stage which is always applicable, the aim is to check whether the operation notified constitutes a concentration and therefore comes within the scope of that regulation. The second stage, which is only embarked upon in the event of a negative decision at the end of the first stage, involves an assessment of the operation in the light of Article 85 of the Treaty and culminates in a final decision.

36 The applicants consider, for their part, that the contested decision constitutes a definitive legal act, capable of forming the subject-matter of an action for annulment, in accordance with settled case-law (*Air France* v *Commission*, cited above).

Findings of the Court

37 According to settled case-law, any measure which brings about a distinct change in the legal position of the undertakings concerned by producing definitive legal effects is an actionable decision (see Case 60/81 *IBM* v *Commission* [1981] ECR 2639, Case T-64/89 *Automec* v *Commission* [1990] ECR II-367 and *Air France* v *Commission*, cited above, paragraphs 43 and 50).

38 The classification of an economic operation in a formal Commission decision adopted following a specific procedure, established, in this case, by Regulation No 4064/89, and involving the choice by that institution of a supervisory procedure, does not constitute a mere preparatory measure in respect of which the applicants' rights might adequately be protected by an action for annulment of the decision terminating the procedure, where that decision or the action which lies against it would not enable the irreversible consequences of that classification for the legal situation of the applicants to be eradicated (see, in particular, along similar lines Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, paragraphs 19 to 24, and Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145, paragraphs 26 to 30, in which the Court held that a decision classifying aid as new constitutes an actionable measure inasmuch as it involves the application of a review procedure, a feature of which is the suspension of payment of the aid contemplated under Article 93(3) of the Treaty, for as long as it has not been declared compatible with the Treaty).

39 In the present case, as Article 6(1)(a) of Regulation No 4064/89 expressly provides, the contested decision brings to an end the procedure under that regulation which was initiated by notification of the agreements providing for the creation of CG Vita, by finding that the operation in question did not constitute a concentration on the ground that it was a cooperative venture.

40 However, under Article 22(1) and (2) of Regulation No 4064/89, as it was worded at the time when the contested decision was adopted, the regulation is applicable only to concentrations defined in Article 3 which are thus exempt from the application of Regulation No 17.

41 The contested decision, which finds that the setting up of CG Vita does not constitute a concentration and thus falls outside the scope of Regulation No 4064/89, therefore has the effect of bringing that operation within the prohibition on agreements, decisions and concerted practices under Article 85 of the Treaty and the separate and distinct procedure provided for in Regulation No 17.

42 The contested decision lays down the criteria for assessing the lawfulness of the operation in question, as well as the procedure and, potentially, the sanctions applicable to it. It thus affects the legal position of the applicants by depriving them of the opportunity of having the lawfulness of the operation in question reviewed purely from a structural point of view under the accelerated procedure introduced by Regulation No 4064/89, with a view to securing a definitive decision on compatibility with Community law.

43 In those circumstances, contrary to the Commission's allegations, the contested decision is not merely a preparatory measure against whose unlawfulness adequate judicial protection may be afforded to the applicants by means of an action against the decision on the application of Article 85 of the Treaty. It constitutes a definitive decision which may form the subject-matter of an action for annulment under Article 173 of the Treaty in order to secure judicial protection of the applicants' rights under Regulation No 4064/89.

44 For all those reasons, the objection of inadmissibility raised by the Commission must be rejected.

Substance

45 The applicants' arguments may be grouped under three heads of claim based respectively on the allegation that CG Vita is in the nature of a concentration, breach of the applicants' right to be heard during the administrative procedure and the absence or inadequacy of the statement of reasons for the contested decision.

The first plea: erroneous appraisal of the operation in question

Arguments of the parties

46 The applicants maintain that CG Vita is in the nature of a concentration. That joint venture, it is said, enjoys operational autonomy and is neither intended nor has the effect of coordinating the competitive behaviour of the founding companies. It therefore satisfies the two conditions laid down in the second subparagraph of Article 3(2) of Regulation No 4064/89, as it was worded when the contested decision was adopted, before it was amended by Regulation No 1310/97. Those two conditions were further elucidated by the Commission in its 1994 Notice on the distinction between concentrative and cooperative joint ventures under that regulation which was applicable at the time (OJ 1994 C 385, p. 1, hereinafter 'the Notice').

— The condition as to operational autonomy

47 As regards, first of all, the condition as to operational autonomy, the applicants stress at the outset that this concept is to be assessed with regard to the characteristics of the relevant market, which is in this case said to be the life assurance market, and to the detailed arrangements under which small-scale undertakings, such as CG Vita, operating on that market, ordinarily function.

48 In the present case, CG Vita is said to have sufficient resources available to it in terms of finances, staff and assets in order to carry on its business in the life assurance sector on a permanent basis. Evidence of that is afforded by the authorisation to carry on its insurance business granted to it by ISVAP on 17 December 1996 following, *inter alia*, an increase in its share capital from ITL 2 billion to ITL 15 billion pursuant to a decision of its board of directors of 2 September 1996. The organisation chart of that joint venture initially

comprised 15 persons. That number was to be increased to 23 during the first five years.

49 Secondly, CG Vita is said to perform functions normally carried out by the other undertakings operating on the life assurance market and to be in a position to determine its own commercial policy independently. The technical and managerial assistance provided to CG Vita by its parent companies does not deprive it of operational autonomy. The services rendered to it by Generali at cost price are those in respect of which insurance companies of comparable size are accustomed to calling upon outside companies. In particular, it is customary for life assurance companies to have recourse to the reinsurer's choice of doctor even in respect of contracts not liable to be ceded. Yet CG Vita reinsures with Generali among others, to the extent of the excess, risks above a threshold of ITL 100 million under an excess agreement providing for a risk premium, in keeping with regular practice. Moreover, use of Generali's medical risk assessment service in no way affects CG Vita's autonomy in taking decisions with regard to the acceptance of risks. Moreover, the business plan (p. 17) estimated the initial cost of all assistance in actuarial matters, risk selection, internal auditing of the company and IT procedures at ITL 800 million. According to those forecasts, that cost is set to increase by 5% per annum to reach ITL 942 million during the fifth year of trading. Finally, that assistance is purely temporary. Under the business plan, it is not set to exceed the first three years of trading.

50 From that point of view, the applicants criticise the Commission for not conducting an adequate in-depth survey of the extent and duration of the parent companies' support. In the application they state that CG Vita is, before the end of the first business quarter, to engage an independent actuary who is to be assisted during the first year by an adviser from Generali. Assistance from the parent company as regards internal auditing was to come to an end 'on closure of the balance sheet in respect of the first/second business year'. As regards IT procedures, the business plan provides for the cost of the acquisition by CG Vita of an independent IT management system for life assurance companies, when that system, which has been bought by the companies in the Generali group and is in the process of being customised, becomes available during 1997.

51 As regards the assistance in distribution provided by Unicredito, the contested decision gives no explanation. In marketing its own products CG Vita uses the sales network of Unicredito, acting as agent for the joint venture. Under a well-established practice, the use of such a distribution system does not undermine the operational autonomy of a joint venture (see, in particular, Commission Decisions of 15 June 1995 in Case No IV/M.586 — Generali/Comit/Flemings, and of 22 February 1995 in Case No IV/M.543 — Zurigo/Banco di Napoli). Moreover, the letter of 9 February 1996, supplementing the letter of intent, expressly limited to five years the validity of the exclusivity clause agreed by Unicredito.

52 Thirdly, it is in any event impossible to create innovative products on the life assurance market. In that connection, products which are simplified solely in order to make the vendor's task easier and are marketed through the intermediary of the banking network are essentially identical, from the assured's point of view, to those sold by the traditional distribution networks. In the life assurance sector, therefore, new products — in respect of which the exclusivity clause agreed by the parent company entrusted with their distribution is justified because it is an essential prerequisite for market access — are those put on the market for the first time by a new undertaking.

53 It is in that light, moreover, that the position adopted by the Commission in its earlier decisions is to be interpreted. In particular, in the abovementioned Zurigo/Banco di Napoli decision, the 'novelty' of the joint venture's product in relation to those offered by the parent insurance company is arguable, inasmuch as, according to the applicants, the novelty is limited to the method of payment of the insurance premium. Similarly, the Commission referred in Case No IV/M.707 (Toro Assicurazioni/Banca di Roma) to the fact that 'the joint venture is to market products under its own name', without concerning itself with the difference in kind and content between its products and those of Toro (point 8 of the decision).

54 In any event, in the present case, CG Vita markets its products under its own label. After a customary and limited running-in period, the products are 'customised' in order to steer them towards certain specified categories of customer.

55 Moreover, the applicants deny the Commission's assertion that CG Vita markets products already distributed by Generali. With the sole exception of temporary insurance in the event of death, where the capital sum and annual premium remain constant — the best-selling product — CG Vita's products are modelled on the insurance policies of Eurovita and were conceived and designed entirely independently of the technical structures put in place by Generali. Furthermore, a new product — temporary insurance in the event of death for the balance payable by way of annual premium — was independently created by CG Vita and is not sold individually by any other company in the Generali group.

56 It follows from all the foregoing considerations that the Commission in the present case resorted to a strict application of the condition relating to operational autonomy. It accorded different treatment, without any justification, to a situation which was essentially identical to those which it had examined in earlier decisions. It thus infringed the principles of legal certainty and non-discrimination and was guilty of an abuse of power.

57 On this point the applicants rely on a series of decisions in which the Commission is said to have decided in favour of the operational autonomy of joint ventures whose economic links with the parent companies were much more far-reaching than those of CG Vita (Commission Decision 93/247/EEC of 12 November 1992 declaring a concentration to be compatible with the common market (Case No IV/M.222 — Mannesmann/Hoesch, OJ 1993 L 114, p. 34); Decisions of 5 February 1996 in Case No IV/M.686 — Nokia/Autoliv; of 22 November 1992 in Case No IV/M.266 — Rhone Poulenc Chimie/SITA; of 22 December 1993 in Case No IV/M.394 — Mannesmann/Rewe/Deutsche Bank and of 27 November 1995 in Case No IV/M.648 — McDermott/ETPM).

58 For its part, the Commission, supported by the Italian Republic, considers that CG Vita lacks operational autonomy owing to the extent and financial significance of the assistance which Generali and Unicredito continue to provide to it, and the complete uncertainty as to whether there is any time-limit on that assistance.

59 Moreover, in the case of a joint venture which is not yet operational, like CG Vita, it is necessary, in assessing its capacity to operate independently on its own market, to ascertain that it is in a position to place on that market products which are not yet marketed by one of the parent companies or which, after the joint venture has been set up, will no longer appear as part of that company's portfolio of products. In that connection the novelty of a product cannot lie in a mere change of the brand name under which it is marketed by one of the parent companies.

— The condition that there should be no coordination of competitive behaviour

60 The applicants deny that CG Vita was set up as a vehicle for cooperation between Generali and Unicredito. They claim, first, that the other forms of cooperation contemplated in the letter of intent are in no way connected with CG Vita's business. They refer to a preferential relationship based on reciprocity in the main areas in which Generali and Unicredito carry on business. Moreover, they are purely hypothetical.

61 Furthermore, since only one of the two parent companies will carry on business on CG Vita's market, any suggestion that the competitive behaviour of those parent companies will be coordinated can be ruled out. Generali and Unicredito carry on business on totally distinct markets and, following the creation of CG Vita, Unicredito has not retained any holdings in companies operating on life assurance markets.

62 In that regard, the applicants challenge in particular the line of argument taken by the Italian Government to the effect that 'in many areas, banks and insurance companies supply broadly interchangeable products and services'. In any event CG Vita does not operate in any of the sectors (corporate banking, fund management) in which there is growing competition between banks and insurance companies.

63 The Commission emphasises that the contested decision is in no way based on the fact that the venture in question forms part of a scheme for wider cooperation between the parent companies. The projected schemes for wider cooperation in the future contemplated in the letter of intent were appraised only peripherally in relation to the main argument concerning the operational autonomy of CG Vita. The Commission claims to have taken account of those projected schemes only because of the absence of adequate information concerning the operational autonomy of that joint venture. According to the Commission, an analysis of relations between the parent companies as a whole, as set out in the letter of intent, might, together with other material, have provided more cogent evidence establishing, if that were the case, the existence of operational autonomy. In particular, the more the joint venture appears likely to be merely a vehicle for cooperation between the parent companies operating on vertically linked markets, the more reason there is to call into question its autonomy.

64 According to the Italian Government, the letter of intent shows that the joint venture is, in the present case, a means of coordinating the competitive behaviour of the parent companies. As is clear from the most recent market trends, banks are becoming the direct competitors of insurance companies by providing a wide range of financial products and services which are broadly interchangeable with insurance products. Furthermore, they constitute a preferential network for the distribution of those products. In the circumstances, coordination between the founding companies is therefore of specific strategic significance in terms of the elimination of potential competition on adjacent markets and in terms of securing a preferential outlet for those products.

Findings of the Court

65 Article 3 of Regulation No 4064/89 defines the concentrations covered by that regulation. Joint ventures are defined in paragraph 2 of that article which, in the version of that provision which was in force until 1 March 1998 and which applies in this case, provided that:

'2. An operation, including the creation of a joint venture, which has as its object or effect the coordination of the competitive behaviour of undertakings which remain independent shall not constitute a concentration within the meaning of paragraph 1(b).

The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 1(b).'

66 The abovementioned provisions of Article 3 must be interpreted in light of the 23rd recital in the preamble to Regulation No 4064/89, which is couched in the following terms:

'(23) Whereas it is appropriate to define the concept of concentration in such a manner as to cover only operations bringing about a durable change in the structure of the undertakings concerned; whereas it is therefore necessary to exclude from the scope of this regulation those operations which have as their object or effect the coordination of the competitive behaviour of independent undertakings, since such operations fall to be examined under the appropriate provisions of the regulations implementing Article 85 or Article 86 of the Treaty; whereas it is appropriate to make this distinction specifically in the case of the creation of joint ventures'.

67 It follows from the wording of Article 3 that the creation of a joint venture is covered by Regulation No 4064/89 only if it enjoys operational autonomy and its creation does not have as its object or effect the coordination of the competitive behaviour of the undertakings concerned. If one of those conditions is not satisfied, the joint venture is classified as cooperative and is treated as an agreement.

68 However, Regulation No 4064/89 does not clarify the criteria making it possible to determine to what extent those two conditions may be regarded as satisfied.

69 In interpreting those conditions, regard must be had above all to their purpose which is to demarcate the scope of Regulation No 4064/89 from that of Regulation No 17, the two regulations being mutually exclusive, as provided for in Article 22(1) and (2) of Regulation No 4064/89. Under the former version of that regulation, which is applicable in the present case, that entails an assessment of the commercial significance of the matters on which there is to be cooperation in relation to structural aspects.

70 In the present case, in light of the parties' arguments and the evidence in the file, it is for the Court to ascertain whether or not CG Vita enjoys operational autonomy viewed against the background of the company's creation. That question must be examined on the basis of the evidence available to the Commission at the time when it adopted its decision.

71 In the contested decision the Commission concludes that CG Vita does not enjoy operational autonomy owing, in particular, to the scale and specific commercial significance of the assistance provided to it on a lasting basis by its parent companies in regard to production, management and distribution of insurance policies (points 15 and 16 of the contested decision).

72 In that connection it should be noted that certain of the arguments relied on by the applicants to counter the appraisal contained in the contested decision are based on information which did not appear in the letter of intent or the business plan and which had not been made available to the Commission at the time when it examined the operation at issue. That is true, in particular, of the arguments concerning the temporal limitation of assistance by the parent companies in actuarial matters and internal auditing (see paragraph 50 above). Such factors may not be taken into account in appraising the lawfulness of the contested decision, which must be examined on the basis of the evidence available to the Commission at the time of its adoption.

73 Moreover, in order to assess the effect of the parent companies' support on the operational autonomy of CG Vita, regard must be had to the characteristics of the market in question and a determination must be made of the extent to which CG Vita carries out the functions normally performed by other undertakings operating on that market.

74 In the present case, the relevant market was defined in the contested decision as the life assurance market viewed not in static but in dynamic terms, that is to say as a life assurance market largely reliant on the banking network for distribution services. This trend in the market in question is, moreover, confirmed by the fact that the share of life assurance premiums placed through the intermediary of the banking sector rose between 1991 and 1995 from 4% to 20% of revenue generated by life assurance premiums at national level (paragraph 20 of the contested decision).

75 Regard being had to this characteristic of the market in question, the applicants argue that an existing but not yet operational undertaking reliant, as is CG Vita, on the services of a banking group for the distribution of its products cannot be regarded as bereft of functional autonomy merely by virtue of the fact that an exclusivity clause was imposed on the banking group for a limited period, namely five years. Besides, it is common practice in the sector in question for life assurance companies of a comparable size to CG Vita to have recourse to outside

companies for the purpose of distribution and assistance in actuarial matters, internal auditing, choice of doctors and IT procedures.

76 Although the applicants' arguments might be acceptable in regard to the use of each of the abovementioned services considered individually, that is not the case where the joint venture is dependent on its parent companies for the provision of all of those services beyond an initial running-in period during which such assistance may be deemed to be justified in order to enable the joint venture to gain access to the market.

77 In the present case, however, the Court finds that the joint venture became operational by virtue of the founding companies' supplying almost all of the services relating to the business of production, management and marketing of insurance policies. In particular, under the business plan CG Vita will not be in a position, at least during its first five years of business, to manage autonomously the services associated with the production and management of insurance policies. Generali will intervene with regard to accounting procedures, the issue of insurance policies, settlements of claims, calculation of the balance sheet reserve, technical and administrative management of the portfolio and, finally, internal auditing of the joint venture. For its part, Unicredito is to make available to CG Vita the requisite structures and IT services for the marketing of insurance products, enabling it to channel the movement of funds. In addition, even if the letter of intent provides for the theoretical possibility of the joint venture's having recourse to other distribution channels, the business plan refers solely to the network of agencies in the Unicredito group.

78 Moreover, according to the documents — placed on file — which were available to the Commission when it adopted the contested decision, the action taken by the parent companies was not limited in time. Only the exclusivity clause imposed on Unicredito for the distribution of CG Vita's products was limited to a five-year period. The applicants stated for the first time before the Court (in the reply) that such action by the parent companies in relation to CG Vita's production and management would be limited to its first three years of trading.

79 For all the foregoing reasons, the Commission was entitled to find in the contested decision that, on the information at its disposal, it was unable to conclude with a sufficient degree of probability that the joint venture actually enjoyed operational autonomy.

80 In those circumstances, the allegation that the Commission treated the applicants in a discriminatory fashion cannot be upheld. The present case may be distinguished from earlier Commission decisions relied on by the applicants, particularly in terms of the scale of the assistance provided to CG Vita by the parent companies at every stage of its operations and by the duration of such assistance which, at the time when the contested decision was adopted, was not limited to the normal start-up phase.

81 The Commission was also entitled to find that, in the absence of evidence showing that CG Vita enjoyed sufficient operational autonomy, the context in which the joint venture was set up confirmed its lack of autonomy.

82 In that connection, suffice it to note that the letter of intent clearly indicates that the creation of CG Vita forms part of a wider scheme of cooperation between the two parent companies, even if, as the applicants observe, the proposed collaboration envisaged in that document is not precise and detailed. The cooperation proposed is expressly mentioned in the letter of intent (see paragraphs 9 and 14 to 18 above). In particular, it contains the commitment of both parent companies to opt preferentially for each other's services, an undertaking by Unicredito to refrain from acquiring holdings in other insurance companies and an undertaking by Generali to refrain from entering into similar cooperation and/or participation agreements with other banks. In more general terms, the letter of intent records the resolve of the parties 'mutually to integrate their activities in the framework and through the contribution of their respective skills', without however envisaging the merger of the two parent companies in order to bring about such integration.

83 It follows from all the foregoing that, since CG Vita has no operational autonomy, it cannot be regarded as being in the nature of a concentration. Consequently, there is no need to go on to examine those matters relating to cooperation between the undertakings concerned which are referred to in the first subparagraph of Article 3(2) of Regulation No 4064/89, as it was worded before its amendment by Regulation No 1310/97.

84 The first plea must therefore be rejected.

The second plea: breach of the applicants' right to be heard

Arguments of the parties

85 The applicants allege that the Commission omitted to inform them that it had 'serious doubts' concerning CG Vita's operational autonomy after receiving their replies to its initial request for information. By refraining from requesting further particulars, for example at the time of the second request for information on 6 March 1996 or at the informal meeting of 13 March 1996, the Commission led the undertakings concerned to believe that they had provided exhaustive answers. For that reason, those undertakings were not given the opportunity to make their views known on the scale and duration of their assistance to CG Vita and, if appropriate, to amend their agreement.

86 The Commission considers that it alerted the applicants to a sufficient extent in its first formal request for information of 23 February 1996 to its doubts as to whether the operation in question was in the nature of a concentration. In those circumstances the applicants have defended their position by providing the Commission with all necessary information in their reply to the initial request for

information or at the meeting of 13 March 1996 at which officials from the MTF informed them that the Autorità Garante della Concorrenza e del Mercato had also expressed doubts as to whether the joint venture was in the nature of a concentration.

Findings of the Court

87 Article 18 of Regulation No 4064/89 expressly confers on undertakings which are concerned, including the notifying undertakings, the right to be heard before the adoption of certain types of decisions set out therein. It does not mention decisions finding, pursuant to Article 6(1)(a), that the operation notified is not covered by Regulation No 4064/89, as in the present case.

88 None the less, observance of the rights of the defence constitutes a fundamental principle of Community law (see Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 7, and Case T-260/94 *Air Inter* v *Commission* [1997] ECR II-997, paragraph 59) and must therefore be observed prior to the adoption of any decision likely to have an adverse effect on the undertakings concerned. In accordance with that principle, Article 11 of Regulation No 4064/89 also provides that, when requesting information, the Commission must in particular state the purpose of its request. Moreover, in the eighth recital in its preamble, Regulation No 3384/94 states that, following notification of a concentration, the Commission is to 'maintain close contact with those parties to the extent necessary to discuss with them any practical or legal problems which it discovers on a first examination of the case and if possible to remove such problems by mutual agreement'.

89 In the present case, the Commission clearly stated in its initial request for information that it needed further particulars concerning CG Vita's operational autonomy in order to be able properly to classify it as a full function joint venture (see paragraph 21 above).

90 In those circumstances, the Commission took adequate steps to draw the applicants' attention during the administrative procedure to the difficulties raised by that classification. In that connection there is no need to ascertain whether, as suggested by the Commission and contrary to the applicants' allegations, it reiterated its doubts as to CG Vita's autonomy at the informal meeting of 13 March 1996.

91 What is more, under Regulation No 3384/94 (Article 3 and third recital in the preamble), it was for the notifying parties to make full and honest disclosure to the Commission of the facts and circumstances which were relevant to the decision to be taken on the notified concentration.

92 In light of that obligation, the Commission cannot be bound by the requirements inherent in observance of the rights of the defence to repeat its request where the reply to a request for information has been inadequate.

93 It follows that the second plea must be rejected.

The third plea: absence or inadequacy of the statement of reasons

Arguments of the parties

94 The applicants claim that the Commission did not give reasons for the contested decision, merely stating that 'on the information and evidence at its disposal, it is not in a position to conclude with a sufficient degree of probability that the joint

venture actually enjoyed adequate operational autonomy' (paragraph 13). That failure to state reasons was the result, it is argued, of shortcomings in the investigation.

95 In the Commission's view, the statement of reasons for the contested decision is in conformity with Article 190 of the Treaty. Indeed it is the evidence supplied by the applicants during the administrative procedure which did not enable the Commission to establish with a sufficient degree of probability that the joint venture enjoyed operational autonomy.

96 The Italian Republic considers that in the contested decision the Commission gave a definitive and adequately reasoned assessment of the operation at issue, based on information which it had gathered and which, moreover, was adequate.

Findings of the Court

97 Since the present case is concerned with the prior examination of an operation which, by definition, had not yet been put into effect, the Commission was only able to ascertain whether CG Vita would enjoy operational autonomy on the basis of the information supplied to it by the applicants. Whether the contested decision is adequately reasoned in law must be ascertained in light of the information and documents available to the Commission at the time of its adoption.

98 In that connection, it follows clearly from paragraph 17 of the contested decision that, in order to assess CG Vita's operational autonomy, the Commission relied on an analysis of the scope and duration of the assistance provided to the joint venture by its parent companies, drawn from the statements and documents on file, which had been made available to it by the applicants (see paragraph 24 above). On the basis of that analysis, set out in the contested decision, the

Commission took the view that it was unable to conclude with a sufficient degree of probability that the joint venture enjoyed adequate operational autonomy. In view of the foregoing, the contested decision must be regarded as being adequately reasoned in law.

99 It follows that the third plea must be rejected.

Costs

100 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the defendant has asked for costs and the applicants have been unsuccessful, they must be ordered to pay the costs. The intervener is to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)

hereby:

1. Dismisses the application;

2. Orders the applicants to pay the costs;

3. Orders the intervener to bear its own costs.

Vesterdorf Bellamy Moura Ramos

Pirrung Mengozzi

Delivered in open court in Luxembourg on 4 March 1999.

H. Jung B. Vesterdorf

Registrar President